Supreme Court, U.S.
FILED
JAN 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SHAARE TEFILA CONGREGATION, *et al.*,
Petitioners,

v.

JOHN WILLIAM COBB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT MICHAEL DAVID REMER

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QUESTION PRESENTED

Was the court below correct in affirming the dismissal of the plaintiffs' claim under 42 U.S.C. § 1982 since discrimination against Jews is not race discrimination within the meaning of that statute, regardless of the subjective, irrational perceptions of the defendants?

PARTIES TO THE PROCEEDING

The appellants in the court of appeals (now petitioners) were Shaare Tefila Congregation, Rabbi Martin S. Halpern, Shirley Altman, William Harkaway, Marshall S. Levin, Maurice Potosky and Dr. Jacob Teller. The appellees in the court of appeals (now respondents) were John William Cobb, William Randall Harris, Thomas Lloyd Heine, William Hess, Thomas Joseph Hunt, Jr., Raymond Lee Jordan, Dominic Queen and Michael David Remer. Only Michael David Remer, through court-appointed counsel, was an active appellee before the court of appeals. Mr. Remer now is a respondent before this Court, which has granted him leave to proceed *in forma pauperis*.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. A. 1a-23a, 36a-38a)[1] is reported at 785 F.2d 523. The opinion of the United States District Court for the District of Maryland (Pet. A. 24a-35a) is reported at 606 F. Supp. 1504.

RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 1982 (1982)

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Civil Rights Act of 1866
Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any

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[1] "Pet. A." references are to pages of the Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. "J.A." references are to pages of the Joint Appendix.

law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

RELEVANT CONSTITUTIONAL AMENDMENT

U.S. Const. amend. XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

STATEMENT OF THE CASE

On March 6, 1984, the Shaare Tefila Congregation and several of its members and employees[2] filed this civil action in the United States District Court for the District of Maryland against eight individual defendants. The complaint (Pet. A. 39a) asserted various federal and state claims arising from the alleged desecration of the synagogue of the Shaare Tefila Congregation in Silver Spring, Maryland. Federal jurisdiction was sought over claims under the federal civil rights statutes, 42 U.S.C. §§ 1981, 1982 and 1985(3), as well as over pendent state law claims for trespass, nuisance and intentional infliction of emotional distress.

In the complaint, the Congregation asserted that the defendants conspired to desecrate and did desecrate the synagogue of the Shaare Tefila Congregation. (Pet. A. 43a). The defendants allegedly painted various anti-Semitic words and symbols on the outside walls of the synagogue. (Pet. A. 43a). The complaint also alleged that the

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[2] The plaintiffs (now petitioners) sometimes will be referred to collectively herein as "the Congregation."

"[d]efendants' desecration of the synagogue was motivated by racial prejudice in that defendants perceive plaintiffs as racially distinct because they are Jews." (Pet. A. 45a).

One of the defendants, Michael David Remer, by court-appointed counsel, filed a motion to dismiss the plaintiffs' complaint under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. In opposing that motion, the Congregation presented excerpts from deposition testimony and three affidavits, accompanied by exhibits, in support of the factual allegations contained in the complaint. (Pet. A. 49a-75a). The deposition testimony and affidavits described the vandalism, the history of anti-Semitism and the defendants' alleged irrational misapprehensions of Jews as members of a distinct and inferior race.

The Congregation contends that the district court, and presumably, the Fourth Circuit, erred in excluding the voluminous extra-pleading materials which it submitted relating to its anticipated proof. (Brief for the Petitioners, 9, n.16). However, in deciding the motion to dismiss, the district court clearly assumed the truth of all of the uncontroverted factual allegations in the complaint. (Pet. A. 26a). Under the circumstances, it was unnecessary for the plaintiffs to prove their allegations, and, as noted by the district court, the extra-pleading materials did not "facilitate the disposition of this action." (Pet. A. 24a, n.1). Even if all of the facts contained in those materials are accepted as true, they do not better the Congregation's jurisdictional position under the federal civil rights acts.

On April 22, 1985, the district court granted defendant Remer's motion to dismiss the Section 1982 claim,[3] hold-

[3] The district court also dismissed the plaintiffs' other civil rights

ing that the plaintiffs' allegations of racial misperceptions by the defendants did not constitute race discrimination within the meaning of that statute:

> The Court is unwilling to adopt an interpretation which relies so entirely on the idiosyncracies [sic] of individual defendants in civil rights cases. As defendant notes, such an approach would have the practical effect of extending § 1981 and § 1982 to apply to any group, however defined, merely by virtue of alleging that an individual defendant perceived the group as racially inferior, however irrational that perception might be.

(Pet. A. 30a). In determining the race discrimination covered by the statute, the district court focused on the "racial background" of the plaintiffs, rather than on the "racial perceptions" of the defendants. (Pet. A. 30a-31a). It noted the plaintiffs' agreement that "Jews do not constitute a distinct or recognizable 'race' and are not commonly identified as such." (Pet. A. 31a). Consequently, the district court held that, despite the distorted beliefs of certain deviant groups, "discrimination against Jews is not race discrimination within the meaning of the statutes in question." (Pet. A. 31a). Although the motion to dismiss was filed on behalf of only one defendant, the district court found that its decision to decline jurisdiction required dismissal of the action against all of the defendants. (Pet. A. 34a).

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claims, holding that: (1) the complaint did not allege the requisite state action under Section 1981's "full and equal benefit" clause (Pet. A. 26a-29a), and (2) the complaint did not allege the requisite violation of federal predicate rights under Section 1985(3). (Pet. A. 31a-34a). In light of its dismissal of all of the federal claims, the district court also dismissed the plaintiffs' pendent state claims. (Pet. A. 34a).

Contrary to the plaintiffs' contentions, the district court did not find that the defendants did not act out of racial prejudice (Brief for the Petitioners, 9), nor did it find that Jews never could state a claim under Sections 1981 and 1982. (Brief for the Petitioners, 10). It simply attempted to determine the statute's coverage and to apply that coverage to the facts in this case. It found that the statute was addressed to discrimination based on "racial background" and that the plaintiffs in this case had not sought "judicial recognition of a Jewish racial identity." (Pet. A. 30a). Accordingly, the district court dismissed the plaintiffs' Section 1982 claim because the complaint did not allege discrimination based on race within the meaning of that statute.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision on March 7, 1986. (Pet. A. 1a-23a, 36a-38a). Writing for the Court, Judge Hall upheld the district court's dismissal of the plaintiffs' Section 1982 claim,[4] stating:

> We . . . find nothing in the statute, its legislative history, or subsequent case law which would lead us to conclude that section 1982 was intended to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants.

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[4] The Fourth Circuit unanimously affirmed the other holdings of the district court that: (1) the plaintiffs had failed to allege a claim under Section 1981's "full and equal benefit" clause because no state action was involved in the defendants' acts (Pet. A. 4a-5a), and (2) the plaintiffs had failed to allege a violation of any of the predicate rights upon which Section 1985(3) claims may be based. (Pet. A. 7a-9a). In its Petition for Writ of Certiorari, the Congregation did not seek this Court's review of the lower courts' holdings under Sections 1981 and 1985(3).

(Pet. A. 6a) (emphasis in original). The Fourth Circuit agreed with the district court that race discrimination under Section 1982 cannot be determined only by reference to "the subjective, irrational perceptions of defendants." (Pet. A. 7a). Concluding that "discrimination against Jews is not racial discrimination" under Section 1982, and that Section 1982 "does not address discrimination on account of religion or national origin," the court of appeals upheld the district court's dismissal. (Pet. A. 7a).

Judge Murnaghan, concurring with Judge Hall, recognized the "regrettable consequences" which would result from the plaintiffs' proposed extension of Section 1982's coverage. (Pet. A. 10a). He suggested that the plaintiffs' legal theory would lead to myriad, federal civil rights suits arising out of various defendants' misperceived notions of the racial identity of others. For example, the conflict between Irish Catholics and Protestants, based on ill-conceived notions of racial inferiority, would be covered by the civil rights acts. Rejecting such a broad statutory coverage, Judge Murnaghan nonetheless expressed hope that the plaintiffs would pursue their remedies in state court. (Pet. A. 10a).

Judge Wilkinson dissented from the majority's Section 1982 holding. (Pet. A. 11a-23a). He agreed that discrimination based on religion and national origin is not covered by Section 1982 (Pet. A. 13a-14a) and that "not every wrong against a Jewish citizen would be actionable under the civil rights laws." (Pet. A. 17a). However, without reference to the statute's language or its legislative history, Judge Wilkinson argued for a broad coverage of claims based on the subjective, racial misperceptions of the individual defendants in order to: (1) ensure "adequate coverage" and (2) avoid "the difficult and troubling task of drawing racial lines." (Pet. A. 21a).

First, Judge Wilkinson argued that the "[f]ederal civil rights laws protect citizens from acts of discriminatory intent" (Pet. A. 13a), and that "[t]he focus on the subjective intent of the actor reflects the reality that discrimination and prejudice is grounded in erroneous perceptions." (Pet. A. 14a). He argued that misperceptions regarding racial identity itself, as well as misperceptions regarding the relevance of racial identity (the familiar basis for the civil rights acts' coverage), should be subject to challenge under Section 1982. (Pet. A. 15a).

Second, Judge Wilkinson argued that the failure to determine Section 1982's coverage by the subjective, racial intent of the defendants "saddles the courts with the difficult and inappropriate burden of delineating racial distinctions in a context where they are irrelevant and unnecessary." (Pet. A. 18a). Curiously, in support of the racial intent standard, the dissent cited several other areas of the law, most notably Title VII and the Fourteenth Amendment, where such "difficult and inappropriate" racial classifications are commonplace. (Pet. A. 14a). Judge Wilkinson criticized the majority for failing to offer any guidance in defining an objective race standard, even though, in this case, the courts and counsel agreed that "Jews are not, under any legitimate view, a distinct race, but are in fact members of a religious community with a rich cultural heritage." (Pet. A. 15a). Finally, Judge Wilkinson criticized Judge Murnaghan's reference to the availability of state law remedies. (Pet. A. 22a). Without denying the availability of state remedies or carefully analyzing the language and legislative history of Section 1982, he argued that federal law should provide a federal remedy for civil rights violations such as those in this case.

On October 6, 1986, this Court granted the Congregation's petition for a writ of certiorari on the issue of

whether any citizen who suffers injury as a result of wrongdoing which is motivated by an erroneous racial intent is entitled to invoke the jurisdiction of the federal courts to recover damages under Section 1982.[5] (J.A. 87).

The reprehensibility of the acts of the defendants described in the complaint, as well as the irrationality of their political and sociological perceptions described in the complaint, cannot be gainsaid. The question is not whether the plaintiffs are entitled to pursue a remedy—the question is whether the remedy is to be found in 42

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[5] Although the writ of certiorari was sought and granted only with respect to the Fourth Circuit's Section 1982 holding, the Congregation contends that, if this Court overturns that holding, the plaintiffs' Section 1985(3) claim also must be resurrected. (Brief for the Petitioners, 11, n. 17). In that regard, the Fourth Circuit held that the plaintiffs had not alleged the violation of predicate federal rights which is required to state a claim under Section 1985(3). It suggested that violations of Sections 1981 and 1982 could have formed a sufficient basis for a Section 1985(3) conspiracy claim. (Pet. A. 9a). Indeed, the Fourth Circuit previously has indicated that federal statutory violations constitute deprivations of "equal protection of the laws" or "equal privileges and immunities under the laws" which give rise to liability under Section 1985(3). *McNutt* v. *Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676, 679-80 (4th Cir. 1983). However, contrary to the plaintiffs' argument (Brief for the Petitioners, 11, n. 17), this Court never has held that Section 1985(3)'s protection can be extended beyond the violation of federal constitutional rights. In the case cited by the plaintiffs, *Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366 (1979), this Court held that a plaintiff may not base a Section 1985(3) action on a violation of Title VII. In separate concurrences, both Justices Powell and Stevens took the position that Section 1985(3) only provides a remedy for violations of federal constitutional rights. *Novotny*, 442 U.S. at 379, 385. For a persuasive argument that Section 1985(3) only should address the violation of federal constitutional rights, see Comment, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402 (1979).

U.S.C. § 1982. The Fourth Circuit directed the plaintiffs to other non-federal remedies because it correctly found "nothing in the statute, its legislative history, or subsequent case law" which supports an extension of Section 1982 "to apply to situations in which a plaintiff is not a member of a racially distinct group but is merely *perceived* to be so by defendants." (Pet. A. 6a) (emphasis in original).

SUMMARY OF ARGUMENT

The Jewish plaintiffs sued the defendants under 42 U.S.C. § 1982 to recover for the desecration of their synagogue. This Court has held that the protection of Section 1982 extends only to "a limited category of rights, specifically defined in terms of racial equality." *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966). Recognizing that religious discrimination is not covered by Section 1982, the plaintiffs sought to characterize their religious claim as a race discrimination claim by arguing that the defendants were motivated by the erroneous belief that Jews are members of a distinct and inferior race. The district court and the court of appeals correctly held that the plaintiffs' novel definition of race discrimination under the statute is unsupported by its specific language, its legislative history, or the cases construing it.

Section 1982 guarantees to all citizens the same right to hold real and personal property "as is enjoyed by white citizens." The parties to this litigation agree that the statute addresses only race discrimination, and that Jews are not members of a distinct racial group. However, the Congregation contends that race discrimination under the statute can be determined solely by examining the subjective intent of the perpetrators, without reference to the actual race of the plaintiffs. The specific language of

the statute and its legislative history, as interpreted by this Court, show otherwise. The statute was enacted in the Reconstruction era pursuant to the Thirteenth Amendment in an effort to achieve racial equality by protecting citizens from different treatment based on their race. Accordingly, this Court has held that both blacks and whites are protected from such differential treatment based on race. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). This Court's analysis of the statute's coverage always has emphasized the protection of different racial groups from discrimination. That analysis never has rested on an evaluation of the defendants' subjective intent standing alone.

This Court's interpretation of the coverage of Section 1982 is perfectly consistent with the approach taken by Congress, the federal administrative agencies, and the courts in other areas of modern discrimination law. Title VII, Title VIII, the Voting Rights Act, the Fourteenth Amendment and 42 U.S.C. § 1985(3) all require reference to racial distinctions in order to prove race discrimination. Thus, the Congregation's argument that its approach must be accepted by this Court because race cannot be defined flies in the face of the many other areas of discrimination law in which race routinely is defined.

No one can deny that the complaint in this case alleges grievous wrongs. However, neither the despicable nature of the defendants' alleged conduct, nor the plaintiffs' dissatisfaction with the available state remedies, is a sufficient basis for this Court to create a new federal cause of action. If a new federal remedy is to be created, it must be done by Congress.

ARGUMENT

THE COURT OF APPEALS CORRECTLY UPHELD THE DISMISSAL OF THE CONGREGATION'S CLAIM FOR THE DESECRATION OF ITS SYNAGOGUE UNDER 42 U.S.C. § 1982 BECAUSE THE RACE DISCRIMINATION COVERED BY THAT STATUTE CANNOT BE ESTABLISHED BY REFERENCE TO THE DEFENDANTS' IRRATIONAL AND INACCURATE PERCEPTIONS OF RACE.

A. The Language And Legislative History Of Section 1982, As Interpreted By This Court And By The Lower Federal Courts, Indicate That The Statute Covers Discrimination Based On A Plaintiff's Race And Color And Not Discrimination Based Solely On A Defendant's Erroneous Perceptions Of The Plaintiff's Racial Identity.

The Congregation sued the defendants under 42 U.S.C. § 1982 for the desecration of its place of worship. That statute addresses race discrimination and not religious discrimination. The Congregation concedes that Jews are a religious, not a racial, group. In order to avoid being foreclosed from pursuing what is essentially a religious discrimination claim, the Congregation seeks to stretch the meaning of race discrimination beyond its accepted meaning of discrimination against a racially distinct group to encompass all actions which are motivated by racial prejudice. It argues that the coverage of Section 1982 can be determined by the perpetrators' erroneous perceptions of racial identity. This "misperception" standard is not supported by Section 1982's language, its legislative history or the case law construing the statute.

As recognized by this Court on many occasions, the starting point in every case involving construction of a statute must be the statutory language itself. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976); *Tennessee*

Valley Authority v. *Hill*, 437 U.S. 153, 173 (1978); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). That principle of statutory construction is no less applicable here when the statute at issue—42 U.S.C. § 1982—is a short, general statute which was enacted more than a century ago. The temptation to bypass consideration of the explicit thrust of Section 1982's language, in an attempt to remedy what is admittedly a grievous wrong, must be avoided.

Section 1982 provides:

> All citizens of the United States shall have the same right, in every State and Territory, *as is enjoyed by white citizens* thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (1982) (emphasis added). The Congregation agrees that the above language does not prohibit religious discrimination and that Jews are not members of a distinct race. (Brief for the Petitioners, 13). However, it contends that Section 1982 covers the synagogue's desecration because the defendants' actions were motivated by an erroneous belief that Jews are a distinct and inferior race. The statute contains no language to support the Congregation's novel theory that a Section 1982 claim can rest solely upon the erroneous racial intent of the perpetrators.

To the contrary, as this Court has recognized, the statutory language, "as is enjoyed by white citizens," emphasizes "the racial character of the rights being protected." *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966). Significantly, the statute itself refers to a physical characteristic—white skin color—in defining that racial character. The statutory language thus addresses discrimination based on race, as determined by an immutable physical charac-

teristic. The language of Section 1982 as it originally was enacted in the Civil Rights Act of 1866 also addresses race discrimination in terms of skin color:

> [A]ll . . . citizens, of every *race and color*, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, . . . to . . . hold . . . real and personal property, . . . as is enjoyed *by white citizens*. . . .

Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (emphasis added). As originally enacted, the statute guaranteed equal treatment to all citizens regardless of race and color.

In arguing for their misperception standard, the plaintiffs misconstrue the statute's guarantee of racial equality to all citizens "of every race and color."[6] They make the disingenuous argument that, because the statute applies to "all" persons, not just to selected races, it could not have been intended to address only discrimination based on a person's race. (Brief for the Petitioners, 18-21). The defendants have no quarrel with the Congregation's argument that Section 1982 extends equal protection to persons of every race and color. However, by the clear terms of the statute, that protection constitutes protection from different treatment based on one's race, not protection from every act which is motivated by racial prejudice without reference to the racial characteristics of the plaintiffs.

The Congregation's discussion of the legislative history is aimed at bolstering the same disingenuous argument described above. For example, it cites portions of the

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[6] In fact, the plaintiffs delete the critical language "of every race and color," when they quote the 1866 Act in their argument. (Brief for the Petitioners, 16, n. 19).

legislative history which establish that "Congress did not conceive of the bill as a protection for any specified group of 'races'." (Brief for the Petitioners, 20). In fact, much of the Congregation's discussion of the statute's legislative history is directed at showing what no one denies—that the protection of the 1866 Act extends to all races. (Brief for the Petitioners, 19, 20, n.30, 21, 23). Without question, the statute protects all persons from different treatment based on their race, whatever that race may be.

The legislative origins of Section 1982 support the proposition that the statute protects against discrimination on account of one's race. Section 1982, like Section 1981, originated in the first section of the Civil Rights Act of 1866.[7] *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431, 439 (1973). At the time of that statute's enactment, the Thirteenth Amendment to the U.S. Constitution had been ratified, but the Fourteenth Amendment had not. Accordingly, the constitutional basis for Section 1982, as originally enacted, was the Thirteenth Amendment, which abolished slavery. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-38 (1968).

The legislative history of Section 1982 definitively shows that the statute was designed to protect blacks from discrimination because of their race. After passage of the Thirteenth Amendment abolishing slavery, the 39th Congress recognized the need for legislation to protect and extend the rights of the newly freed slaves.

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[7] Given their common origin, Sections 1981 and 1982 appropriately are construed in an analogous fashion. *Runyon* v. *McCrary*, 427 U.S. 160, 171 (1976); *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431, 440 (1973). Accordingly, cases involving both Sections 1981 and 1982 are discussed herein because those sections should be construed in the same way when evaluating whether they are applicable to discrimination based on the individual discriminators' erroneous racial perceptions.

Accordingly, the Civil Rights Act of 1866 was passed to protect the racial equality of the newly freed blacks.[8] Cong. Globe, 39th Cong., 1st Sess. 322, 474, 503-04, 1151 (1866).

Section 1982's intended application to discrimination on account of one's race also is indicated by the remarks of its draftsmen in the 39th Congress. For example, as noted by the Congregation (Brief for the Petitioners, 20, n.30), Senator Johnson described the scope of Section 1 of the 1866 Act as follows:

> [N]o State shall discriminate at all between any inhabitants within her limits *on account of any race* to which they may belong, whether white or black. . . .

Cong. Globe, 39th Cong., 1st Sess. 505 (1866) (emphasis added). The legislative history contains numerous references to the 1866 Act's objective of guaranteeing racial equality by prohibiting discrimination on account of race and color.[9] By contrast, the Congregation has cited no

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[8] For a thorough discussion of the legislative history of the Civil Rights Act of 1866, see Comment, *Developments in the Law—Section 1981*, 15 Harv. C.R. C.L. L. Rev. 29, 35-64 (1980).

[9] Senator Trumbull, the author of the 1866 Act, noted that the Act would have no effect in states "where all persons have the same civil rights *without regard to color or race*," and would "have no operation in the State of Kentucky when her slave code and all her laws discriminating between persons *on account of race or color* shall be abolished." Cong. Globe, 39th Cong., 1st Sess. 476 (1866) (emphasis added). Senator Trumbull further stated that the Act will "break down all discrimination between black men and white men." *Id.* at 599. Representative Wilson, the Republican floor manager of the bill in the House, noted that the "bill rests on the discrimination relative to civil rights and immunities . . . *on 'account of race, color,* or previous condition of slavery.'" *Id.* at 1118 (emphasis added). Repre-

legislative history discussion which supports its theory that Section 1982 was intended to reach all actions motivated by racial prejudice without reference to an individual's race.[10]

The century-old legislative history of the Civil Rights Act of 1866 is confusing, disjointed and ambiguous in

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sentative Wilson further noted that the bill "secures to citizens of the United States equality in the exemptions of the law. . . . Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another." *Id.* at 1117. Senator Howard stated that the bill "gives to persons who are of different races or colors the same civil rights." *Id.* at 504. Representative Shellabarger stated that the bill's "whole effect is to require that whatever rights . . . the States may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive women of the right to sue or contract or testify. . . . But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures—not to all citizens, but to all races as races who are citizens—equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races." *Id.* at 1293. In discussing the bill, Representative Cook emphasized that, with respect to basic civil rights, Congress must provide that there be no discrimination" *on account of race or color.*" *Id.* at 1124 (emphasis added). Finally, in vetoing the bill, President Johnson described it as attempting to fix "a perfect equality of the white and black races." *Id.* at 1679.

[10] The Congregation claims that the draftsmen's concern for protecting whites who advocated the rights of the newly freed blacks supports its misperception standard. (Brief for the Petitioners, 21-22). The Congregation overlooks the fact that, in extending protection to whites who advocated the civil rights of blacks, the 39th Congress still was focusing on achieving racial equality with reference to the race of individuals. The draftsmen simply decided that they wished to protect those persons who sought to protect others from discrimination based on race. For a further discussion of the Congregation's argument in the context of this Court's cases permitting whites to sue to vindicate the rights of blacks, see Brief for Respondent Michael David Remer, *infra* at 23.

many respects. However, there is no indication in that history that the draftsmen intended anything other than race to be the touchstone for the Act's coverage; the statute was intended to achieve equality among the races. The legislative history simply does not support the misperception standard which has been fashioned out of whole cloth by the plaintiffs.

As illustrated above, in enacting the Civil Rights Act of 1866, the 39th Congress did not intend Section 1982 to cover acts motivated by completely erroneous perceptions of racial identity. Under the circumstances, if the Congregation wishes to secure coverage of such acts under the federal civil rights laws, it must look to the current Congress, rather than to the courts, to fashion a remedy.

Contrary to the Congregation's argument (Brief for the Petitioners, 15), this Court's holdings do not suggest, much less require, the Congregation's interpretation of Section 1982's coverage. Rather, those holdings make the tacit assumption that the statutory protection is based on race. In *Georgia* v. *Rachel*, 384 U.S. 780, 791 (1966), this Court determined the statute's coverage as follows:

> The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, *specifically defined in terms of racial equality.*

Id. (emphasis added). Since *Georgia* v. *Rachel*, this Court has established certain aspects of Section 1982's coverage of race discrimination. For example, it has held that Sections 1981 and 1982 protect the right of black Americans to be free from racial discrimination, whether public or private. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Johnson*

v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). Likewise, it has held that white Americans are protected by Section 1981's prohibition against race discrimination. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). Finally, this Court has noted, in dicta, that Sections 1981 and 1982 do not protect against religious discrimination or national origin discrimination. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 413; *Runyon* v. *McCrary*, 427 U.S. at 167.[11]

Aside from these decisions, this Court never has defined what constitutes race discrimination for purposes of Sections 1981 and 1982. However, the language of its decisions strongly suggests that those civil rights acts protect persons from different treatment based on their race and not from every act which is motivated by racial prejudice.

Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), provides a good starting point in analyzing this Court's understanding of Section 1982's coverage. In *Jones*, this Court held that a private plaintiff could sue private defendants under Section 1982 for refusing to sell him a

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[11] Throughout this litigation, the Congregation has conceded that religious discrimination is not covered by Section 1982. Furthermore, the lower federal courts have refused to extend the statute to encompass claims of discrimination on religious grounds. *Weiss* v. *Willow Tree Civic Association*, 467 F. Supp. 803, 815-16 (S.D. N.Y. 1979) (the district court rejected the Section 1982 claim of a group of Hasidic Jews who, like the plaintiffs in this case, sought to characterize their religious claim as a race claim). *See also Budinsky* v. *Corning Glass Works*, 425 F. Supp. 786, 788 (W.D. Pa. 1977) (persons of Jewish origin are not covered by Section 1981); *Wald* v. *International Brotherhood of Teamsters*, 24 Fair Empl. Prac. Cas. (BNA) 616, 619 (C.D. Cal. 1980) (claims of discrimination against Jews do not fall within Section 1981).

home solely because he was a Negro. In reaching its holding, the Court relied on its earlier decision in *Hurd* v. *Hodge*, 334 U.S. 24 (1948), striking down the judicial enforcement of racially restrictive covenants:

> *Hurd* v. *Hodge*, *supra*, squarely held, therefore, that a Negro citizen who is denied the opportunity to purchase the home he wants *"[s]olely because of [his] race and color,"* 334 US, at 34, 92 L Ed at 1194, has suffered the kind of injury that § 1982 was designed to prevent.

Jones, 392 U.S. at 419 (emphasis added). The Court noted that a Negro citizen does not have the same right to purchase real property "as is enjoyed by white citizens" so long as he can be turned away simply because he is not white. *Id.* at 421. Further emphasizing the racial equality which was the objective of the Civil Rights Act of 1866, the Court quoted the words of Senator Trumbull, the sponsor of the bill, that the bill would "break down *all* discrimination between black men and white men." *Id.* at 432, *quoting* Cong. Globe, 39th Cong., 1st Sess. 599 (1866). In finding that Congress had the power under the Thirteenth Amendment to eradicate private discrimination, the Court again noted that Negroes could not be prevented "from buying and renting property *because of their race or color.*" *Id.* at 438 (emphasis added).

> . . . [W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn *on the color of their skin*, then it too is a relic of slavery.
>
> Negro citizens . . . would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth

> Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.

Jones, 392 U.S. at 442-43 (footnote omitted) (emphasis added).

The above language from the *Jones* decision shows that this Court always has envisioned Section 1982 as protecting individuals from discrimination because of their race. In its Brief, the Congregation ignores the obvious import of the above language and instead relies on language from that decision which is taken wholly out of context. Specifically, the Congregation quotes *Jones* for the proposition that Section 1982 was meant to prohibit "*all* racially motivated deprivations of the rights enumerated in the statute." *Id.* at 426 (emphasis in original). (Brief for the Petitioners, 15, 21). The Congregation neglects to mention that *Jones* addressed the question of whether Section 1982 applies to private, as well as public, actions. *Id.* at 413. It was in that context that this Court held that all racially motivated deprivations of rights, whether by public entities or private individuals, were covered. *Id.* at 426.[12]

This Court next addressed the scope of the Civil Rights Act of 1866 in *McDonald* v. *Santa Fe Trail Transportation*

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[12] The Congregation's misleading use of the quoted language to support its misperception standard is illustrated further by its emphasis on the words "racially motivated" and by its failure to include the entire quoted sentence in its Brief. (Brief for the Petitioners, 15). Unlike the Congregation, this Court emphasized the word "all" and stated:

> . . . § 1 [of the Civil Rights Act of 1866] was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated "under color of law" were to be criminally punishable under § 2.

Jones, 392 U.S. at 426 (emphasis in original). *See also id.* at 436.

Company, 427 U.S. 273 (1976).[13] The Court held that Section 1981 is applicable to race discrimination against white persons, as well as nonwhite persons. However, by reaching the conclusion that both whites and nonwhites are protected, this Court did not decide that the statute's coverage could not be determined by an individual's race. To the contrary, as in the *Jones* decision, the Court assumed that the statute was intended to protect all persons, white and nonwhite, from different treatment based on their race. The specific language of the Court's holding illustrates the latter point:

> . . . [T]he Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts *against, or in favor of, any race.*

Id. at 295 (emphasis added).

This Court's extensive discussion of Section 1981's legislative history in *McDonald* also shows that race is the determinant of the civil rights acts' coverage. The Court emphasized that the first section of the Civil Rights Act of 1866, as originally proposed, provided: "[T]here shall be no discrimination . . . *on account of race, color, or previous condition of slavery* . . . ." *McDonald*, 427 U.S. at 288, *quoting* Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (emphasis added). In discussing the significance of the language "as is enjoyed by white citizens," the Court quoted the remarks of Representative Wilson, Chairman of the Judiciary Committee and the bill's floor manager in the House, who stated that the bill "secures to citizens of

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[13] Between its decisions in *Jones* and *McDonald*, in *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-460 (1975), this Court indicated that Section 1981 also "affords a federal remedy against discrimination in private employment *on the basis of race.*" (emphasis added).

the United States equality in the exemptions of the law. . . . *One race shall not be more favored in this respect than another.*" *McDonald*, 427 U.S. at 292-93, *quoting* Cong. Globe, 39th Cong., 1st Sess. 1117 (1866) (emphasis added). Finally, the Court quoted the following illustrative remarks of Representative Shellabarger:

> Its whole effect is to require that whatever rights as to each of those enumerated civil . . . matters the States may confer upon one race or color of the citizens shall be held by all races in equality. Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise. . . . It secures—not to all citizens, but to all races as races who are citizens—equality of protection in those enumerated civil rights which the States may deem proper to confer upon any races.

McDonald, 427 U.S. at 293, n.23, *quoting* Cong. Globe, 39th Cong., 1st Sess. 1293 (1866).

Several other decisions by this Court support the conclusion that Section 1982 protects individuals from discrimination because of their race. In *Runyon* v. *McCrary*, 427 U.S. 160, 163 (1976), the Court addressed the question whether Section 1981 "prohibits private schools from excluding qualified children solely because they are Negroes." Answering that question in the affirmative, the Court stated:

> Just as in Jones a Negro's § 1 right to purchase property on equal terms with whites was violated when a private person refused to sell to the prospective purchaser solely because he was a Negro, so also a Negro's § 1 right to "make and enforce contracts" is violated if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees.

Id. at 170-71. *See also General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 388 (1982) (requiring proof of discriminatory intent under Section 1981, the Court noted that the evils addressed by the 39th Congress did not include neutral practices "that had the incidental effect of disadvantaging blacks to a greater degree than whites").

In its Brief, the Congregation argues that this Court's decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), supports the misperception standard. (Brief for the Petitioners, 17).[14] In fact, the latter holding is aimed at achieving the statute's objective of racial equality and supports the standard urged by the defendants. In *Sullivan*, this Court held that whites have standing to sue to "vindicate the rights of minorities protected by § 1982." *Sullivan*, 396 U.S. at 237. In so holding, the Court continued to focus on eradicating discrimination against persons because of their race. It simply permitted persons other than the minority victims of that discrimination to challenge it in federal court.

As noted above, this Court has not provided the lower federal courts with a comprehensive definition of race discrimination under Sections 1981 and 1982. Consequently, some of those courts have experienced difficulties in grappling with situations where race discrimination and national origin discrimination argua-

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[14] The plaintiffs also argue that this Court's decision in *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431 (1973), supports application of their misperception standard. (Brief for the Petitioners, 17-18). In *Tillman*, the Court remanded to the district court the issue whether the white plaintiffs successfully could challenge the adoption of a guest policy that excluded their black guests. *Id.* at 440. Because of the posture of the case, the Court's decision in *Tillman* adds nothing to the *Sullivan* holding.

bly are present at the same time. However, in attempting to delineate the coverage of the civil rights acts, no federal appellate court ever has focused on a defendant's erroneous perceptions of racial identity in evaluating the viability of claims under those statutes. Instead, referring to the explicit statutory language, the courts have focused on the plaintiff's physical appearance or skin color.

In *Al-Khazraji* v. *Saint Francis College*, 784 F.2d 505 (3d Cir. 1986), *cert. granted*, 107 S.Ct. 62 (1986), the Third Circuit held that an Arab plaintiff's Section 1981 claim that he had been denied tenure because of "national origin, religion and/or race," *id.* at 508, n. 4, could survive a motion for summary judgment. The court did not hold that a Section 1981 claim can be based on national origin or religious discrimination. Instead, it emphasized the plaintiff's racial characteristics.

Like this court in *McDonald*, the Third Circuit reviewed the legislative history of the Civil Rights Act of 1866 and noted that it was enacted to protect persons of "every race and color" from discrimination. *Id.* at 515. In grappling with the sometimes ethereal distinction between race and national origin, the court stated:

> We believe that Congress's purpose was to ensure that all persons be treated equally, without regard to color or race, which we understand to embrace, at the least, membership in a group that is ethnically and physiognomically distinctive.
>
> . . . .
>
> While the distinction between racial discrimination, which is cognizable under Section 1981, and other types of discrimination, which may not be cognizable, may in some instances be obscure, that cannot justify refusing to attempt the distinction.

> Discrimination based on race seems, at a minimum, to involve discrimination directed against an individual because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.

Id. at 517 (footnote omitted). Clearly, the Third Circuit did not base its determination of the coverage of Section 1981 on the subjective perceptions of the individual defendants, the standard urged by the Congregation herein. In fact, the court requires the very showing of ethnic and physiognomical distinctions to establish Section 1981 coverage which the Congregation criticizes.

In *Alizadeh* v. *Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986), the Fifth Circuit held that the plaintiff could state a claim under Section 1981 for discrimination directed toward her Iranian husband. Like the Third Circuit in *Al-Khazraji*, the court focused on the physical traits of the plaintiff's husband:

> Mrs. Alizadeh's husband was allegedly considered by the defendant to be of a "race other than white," and we cannot say that he is any less ethnically and physiognomically distinctive, as compared to a "white," than was the Iraqi in *Al-Khazraji*.

Id. at 115. *See also Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979) (Mexican-American was permitted to sue under Section 1981 because Mexican-Americans as a group allegedly are treated differently than other "white citizens").[15]

[15] The plaintiffs attempted to rely on the *Manzanares* case in the Fourth Circuit. Without deciding whether that case was correct, Judge Hall distinguished it. It was in the context of distinguishing *Manzanares* that Judge Hall noted that the position of Jews in this society is not analogous to that of Mexican-Americans. (Pet. A. 7a and Brief for the Petitioners, 10). The latter statement was not necessary, or even important, to the Fourth Circuit's ultimate holding that Section 1982's coverage cannot be based only on the subjective, irrational perceptions of defendants.

Neither this Court nor the federal appellate courts have accepted the Congregation's misperception theory for Section 1982 coverage. No court has indicated that the statute covers the desecration of a synagogue simply because the defendants were motivated by the false perception that Jews are members of a different race. In fact, acceptance of the Congregation's theory for Section 1982 liability may well conflict with this Court's prior decision indicating that Section 1982 does not encompass religious discrimination. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). By arguing that the defendants' irrational, racial perceptions may form the basis for a Section 1982 action, the Congregation is attempting to find a back door for coverage of claims of religious discrimination. Under the Congregation's theory, any plaintiff, whether Jewish, Catholic, Mormon, or any other creed, would be able to state a claim under Section 1982 simply by alleging that the defendant who wronged him was motivated by an ill-conceived racial animus. Such a broad expansion of the coverage of Section 1982 never has been condoned by this Court.

The Congregation's misperception theory pushes Section 1982's coverage far beyond the statute's language, as interpreted by its draftsmen and by this Court. Section 1982 was intended to protect individuals from discrimination based on their race in order to guarantee racial equality. To borrow this Court's own words in interpreting Section 1981 in another context, "[t]o infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern." *General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375, 388 (1982). Since the requisite evidence in the legislative record is not present in this case, the Fourth Circuit cor-

rectly refused to extend Section 1982's protection as urged by the Congregation.

B. Congress And This Court Previously Have Approved The Use Of The Type Of Racial Classifications Which Are Necessary To Determine The Scope Of The Protection Afforded By Section 1982.

Despite the obvious thrust of Section 1982's language and legislative history, the Congregation argues that its misperception standard should be adopted by this Court because it is both inappropriate and impracticable to engage in racial classification. (Brief for the Petitioners, 24-30). The Congregation's argument has little credibility in light of the many areas of modern discrimination law in which racial classifications are required by Congress, federal administrative agencies and this Court in an effort to achieve racial equality.

Perhaps the most visible example of modern permissible racial classification can be found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 (1982). Among other things, Title VII prohibits a refusal to hire "any individual" because of "such individual's race." 42 U.S.C. § 2000e-2(a)(1) (1982).[16] According to this Court, a *prima facie* case of disparate treatment can be established by a plaintiff in a Title VII hiring case by showing:

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[16] Section 703 of Title VII, 42 U.S.C. § 2000e-2 (1982), provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

> (i) *that he belongs to a racial minority;* (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792, 802 (1973) (emphasis added).

Similarly, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. By definition, a plaintiff in such a disparate impact case must make racial distinctions in order to show that a particular employment practice has a greater adverse impact on one racial group than on another.

Clearly, in order to prove race discrimination under Title VII, a plaintiff must be able to show that he is racially distinct, the very showing that the Congregation contends is unseemly and impracticable under Section 1982. Furthermore, the fact that Title VII is regarded as the modern analog of Section 1981 supports the existence of a similar requirement under the older civil rights statutes. Indeed, this Court has indicated that "[a]lthough the exact applicability of . . . [Section 1981] has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII." *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583, n. 24 (1979).[17] The Congregation's argument for a mispercep-

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[17] The lower federal courts typically use the Title VII disparate treatment test in employment discrimination cases under Section 1981. *Person* v. *J.S. Alberici Construction Co.*, 640 F.2d 916, 918-19 (8th Cir. 1981); *Hudson* v. *International Business Machines Corp.*,

tion standard ignores the above statement by this Court and extends the coverage of Sections 1981 and 1982 far beyond that available under Title VII.

The invalidity of the Congregation's argument that race cannot be defined for purposes of determining Section 1982's coverage is illustrated further by the recordkeeping requirements imposed on employers by the Equal Employment Opportunity Commission (the "EEOC"). Pursuant to Title VII, the EEOC requires employers with 100 or more employees to file annual employer information reports, called EEO-1's. 29 CFR § 1602.7 (1986). In the EEO-1's, employers must provide a breakdown of their workforce by race in selected job categories. Essentially, the employers are required to categorize their workforce either as White, Black, Hispanic, Asian or Pacific Islander, or American Indian or Alaskan Native.

Other areas of federal law also require reference to racial distinctions. Title VIII of the Civil Rights Act of 1968 prohibits discrimination in the sale or rental of housing "to any person because of race, color, religion, sex, or national origin." 42 U.S.C. § 3604(a) (1982). The Voting Rights Act of 1965 prohibits the imposition of voting qualifications which deny "the right of any citizen . . . to vote on account of race or color." 42 U.S.C. § 1973 (1982). Challenges to race discrimination under the Fourteenth Amendment's equal protection clause require reference to the parties' racial identities in determining whether a violation has occurred. *See Washington* v. *Davis*, 426 U.S. 229 (1976). The racial animus requirement under 42

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620 F.2d 351, 354 (2d Cir.), *cert. denied*, 449 U.S. 1066 (1980); *Crawford* v. *Western Electric Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980). As noted previously, in order to apply the disparate treatment test, racial distinctions must be drawn.

U.S.C. § 1985(3), the civil rights statute prohibiting conspiracies denying equal protection of the laws and equal privileges and immunities under the laws, is established by reference to racial classifications. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). Finally, this Court has approved the use of racial classifications in affirmative action remedies in certain circumstances. *Local No. 93, International Ass'n of Firefighters* v. *Cleveland*, 106 S. Ct. 3063 (1986); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978).

The Congregation's argument that the Fourth Circuit's standard is unworkable because race cannot be defined pales in light of the numerous instances in which race must be defined under federal law. The Fourth Circuit rejected the Congregation's misperception argument and held that both racial distinctiveness and intent are elements of a Section 1982 claim. Its holding was perfectly consonant with the statute's objective of achieving racial equality—an objective which is shared by the Thirteenth and Fourteenth Amendments, by the civil rights statutes described above, and by affirmative action remedies. Clearly, racial determinations are possible when necessary to achieve statutory and constitutional purposes.

C. Not Only Is The Congregation's Suggested Construction Of Section 1982's Coverage Unworkable, But, By Infinitely Expanding The Scope Of The Civil Rights Laws, It Will Lead To Unwarranted Consequences In The Lower Federal And State Courts.

The plaintiffs' suggested standard may have some surface appeal, especially in light of the deplorable events alleged in the complaint. However, in addition to ignoring the absence of legal support for its standard, the Con-

gregation has not addressed the practical difficulties of extending Section 1982 to any person who alleges that a defendant irrationally perceived him as racially distinct. The lower courts are not better equipped to evaluate when an act is racially motivated than to evaluate when the plaintiff (or the person whose rights he seeks to vindicate) is racially distinct.

Under the Congregation's theory, Section 1982 would cover all violations of the property rights enumerated therein which are motivated by racial prejudice. Without some sort of objective race standard, how will the courts evaluate when an act is motivated by racial prejudice? The Congregation makes no attempt to explain how its standard should be applied by the courts but simply asserts that, in this case, it has been conceded that the defendants acted out of a racial motivation. In that vein, it also has been conceded in this case that Jews are not racially distinct. Accordingly, application of a standard which requires the showing of racial distinctions also is not difficult in this case.

The serious difficulties inherent in applying the misperception standard are illustrated by the *amicus curiae* brief filed on behalf of the Anti-Defamation League of B'nai B'rith (the "ADL") and others. The ADL notes that "[t]here are numerous factors—none of which is exclusive—that the courts should consider in determining whether a plaintiff has adequately pleaded and can plausibly assert that he was the victim of *racial* discrimination." (Brief of the ADL, *et al.*, 21) (emphasis in original). The ADL then offers the following suggestions regarding what factors the courts should consider in deciding whether the requisite intent is present:

> The factors to be considered should include the plaintiff's allegations concerning the racial or racist

> motivations of the defendant. In addition, the court should weigh the plaintiff's allegations regarding his own race or skin color. Equally important factors are the extent to which the plaintiff belongs to an identifiable group that is commonly or historically regarded by bigots or lay persons as constituting a "race," as the term is understood in a broad sense. Unless the plaintiff's allegations are inconsistent with the notion that he or she has suffered discrimination that is racial or racist in character, a cause of action has been stated and the plaintiff should be entitled to prove his or her claim.

(Brief of the ADL, 21). *See also* Brief of the ADL, 9, n. 3. Even under the misperception standard, "race or skin color" is a criterion to be considered. The ADL's final suggestion that the plaintiffs should be permitted to prove their case, provided that their allegations are not inconsistent with the notion that they have suffered race discrimination, is of no help to a trial court faced with pleading and proof issues. Such an approach undoubtedly would lead to intolerably different results from one court to another. Most importantly, there is absolutely no indication that the draftsmen of the Civil Rights Act of 1866 intended such a flexible, fact-based standard.

If the Congregation's theory for expanded Section 1982 coverage is adopted, then anyone could state a claim under the statute for actions based on an ill-founded racial determination. As noted by Judge Murnaghan in his concurring opinion in the Fourth Circuit, the Congregation's legal theory would lead to myriad, federal civil rights suits arising out of various defendants' misperceived notions of the racial identity of others. Such suits should not be permitted absent a clear Congressional intent to cover wrongdoing arising out of a misperception of the race of the victim.

By seeking to expand Section 1982 to cover such suits, the Congregation is making a legislative argument. It is asking this Court to judicially legislate a new federal cause of action. In support of its argument for a new federal cause of action, the Congregation argues that state remedies are inadequate and only a federal civil rights remedy will suffice.

The Congregation contends that state criminal and common law remedies are unacceptable because they ignore the deplorable motivation for the defendants' acts. Such is not the case. The injury to individual dignity resulting from the alleged anti-Semitic acts certainly would be considered by a criminal judge in sentencing the wrongdoers and awarding criminal restitution.[18] Likewise, the egregious nature of the alleged acts would be central in the minds of a jury deciding what amount of punitive damages to award for state tort law violations. Such punitive damages are available for all of the pendent state tort claims alleged in the Congregation's complaint. *Bender* v. *Bender*, 57 Md. App. 593, 471 A.2d 335, *cert. denied*, 300 Md. 152, 476 A.2d 721 (1984) (punitive damages may be awarded in trespass cases); *Gorman* v. *Sabo*, 210 Md. 155, 122 A.2d 475 (1956) (punitive damages may be recovered in a private nuisance case); *Moniodis* v. *Cook*, 64 Md. App. 1, 494 A.2d 212, *cert. denied*, 304 Md. 631, 500 A.2d 649 (1985) (punitive damages are available for intentional infliction of emotional distress).

In the final analysis, the adequacy of state law remedies has no bearing on the coverage of Section 1982. This

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[18] In Maryland, judges are free to, and often do, award criminal restitution to the victims of crime. In fact, criminal restitution is available under Maryland law for the very crime of which the defendants herein are accused, malicious destruction of property. Md. Ann. Code art. 27, § 640(b) (1985).

Court's interpretation of that federal statute cannot depend on whether remedies are available under Maryland law or under any other state's law. Rather, its interpretation must be based on the statute's language and legislative history, keeping in mind the legislature's purpose of achieving racial equality. There simply is no evidence that Section 1982 was intended to cover the desecration of a synagogue by defendants, even when those defendants arguably were motivated by an erroneous racial animus. Under the circumstances, the Congregation must look to the Congress and to the state legislatures if it wishes to secure a statutory civil rights remedy for the wrongful conduct alleged in its complaint.

CONCLUSION

For all of the foregoing reasons, respondent Michael David Remer requests that this Court affirm the decision of the United States Court of Appeals for the Fourth Circuit and hold that the federal courts' jurisdiction over claims under 42 U.S.C. § 1982 cannot be based solely on the irrational, racial misperceptions of defendants.

Respectfully submitted,

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